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From Schoolhouse Gate to Locker Room Door: The Student Athlete's Constitutional Right to Protest at a Public University Does Not Stop at the Hardwood

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The Supreme Court has not faced a case involving the public university student athlete's right to protest during game day events, such as during the pre-game warm up, the national anthem, and game play itself. Protests stemming from the arena of sports is nothing new, and athletes are supported by a long and rich history of influential professional athletes making their mark on civil rights movements. In light of recent and tragic killings of Black Americans at the hands of police, collegiate student athletes have begun to use their platform to raise awareness and express their political viewpoints. As a result, conservative lawmakers have urged public universities to act and wholly prohibit such protests in response to players electing to kneel during the national anthem.

This Note explores the current network of student free speech jurisprudence and applies the existing framework to a set of modern protests frequently observed across collegiate athletics: kneeling at the national anthem; wearing non-uniform, warm-up t-shirts with symbolic messages such as "Black Lives Matter," "Arrest the Cops Who Killed Breonna Taylor," and "All Players United"; and wearing symbolic gear such as an armband during game play. Building on existing jurisprudence, this Note forecasts that student athletes at public universities have the constitutional right to protest subject to reasonable limitations.

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INTRODUCTION

Protest in sports today evokes an image of the controversial choice by San Francisco 49ers' quarterback, Colin Kaepernick, to kneel during the national anthem in 2016 to peacefully protest the systemic oppression of Black people, and people of color, in America.[1] In doing so, Kaepernick ignited new interest in America's social justice movements, launching waves of support in professional and amateur athletics.[2] While Kaepernick is now a household name when discussing social justice and Black Lives Matter protests in America, he was preceded by a long and rich history of protest in sports.[3] These protests date back as early as the Byzantine empire[4] but, more recently and better known, have continued with Olympic Gold and Silver medalists Jesse Owens and Jackie Robinson in the 1938 Berlin Games.[5] A short thirty years later in 1968, Olympic Gold and Bronze medalists Tommie Smith and John Carlos famously raised their fists and lowered their heads in a Black Power salute following the assassination of the great Dr. Martin Luther King, Jr. months earlier.[6] Protest in athletics is nothing new.[7]

Under current law, student free speech is *mostly* safeguarded under *Tinker v. Des Moines Independent Community School District*, a broad and sweeping case in favor of public-school students' First Amendment rights. The Supreme Court famously stated, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[8]

So, what exactly happens when collegiate student athletes take free speech to the field or the hardwood? Student athletes at public universities have faced significant backlash for choosing to kneel during the anthem and expressing messages in solidarity with Black lives.[9] In response to these peaceful protests,

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1. Steve Wyche, *Colin Kaepernick Explains Why He Sat During National Anthem*, NFL NEWS (Aug. 27, 2016, 3:04 AM), https://www.nfl.com/news/colin-kaepernick-explains-why-he-sat-during-national-anthem-0ap3000000691077; *see also* Steve Wulf, *Athletes and Activism: The Long, Defiant History of Sports Protests*, ANDSCAPE (Jan. 30, 2019), https://andscape.com/features/athletes-and-activism-the-long-defiant-history-of-sports-protests.

2. *See* Jason Reid, *How Colin Kaepernick Became a Cause for Activists, Civil Rights Groups and Others*, ANDSCAPE (Aug. 22, 2017), https://andscape.com/features/how-colin-kaepernick-became-a-cause-for-activists-civil-rights-groups; *see also* Wulf, *supra* note 1.

3. Wulf, *supra* note 1.

4. *Id.*; Mike Dash, *Blue Versus Green: Rocking the Byzantine Empire*, SMITHSONIAN MAG. (Mar. 2, 2012), https://www.smithsonianmag.com/history/blue-versus-green-rocking-the-byzantine-empire-113325928.

5. Wulf, *supra* note 1.

6. Mélissa Godin, *Athletes Will Be Banned from Protesting at the 2020 Tokyo Olympics. But the Games Have a Long History of Political Demonstrations*, TIME (Jan. 14, 2020), https://time.com/5764614/political-protests-olympics-ioc-ban.

7. *See* Wulf, *supra* note 1.

8. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

9. *See* Blake Summers, *State Lawmakers Call on University Leaders to Stop Athletes from Kneeling During National Anthem*, NEWS 4 NASHVILLE (Feb. 24, 2021), https://tn-archive.wsmv.com/news/state-lawmakers-call-on-university-leaders-to-stop-athletes-from-kneeling-during-national-anthem/article_f466b170-7656-11eb-aa15-3f3afd7576fc.html.

lawmakers have urged public universities to implement policies prohibiting these protests while bearing the school's name.[10]

This Note aims to predict how the Supreme Court will handle public university policies restricting student athletes' free speech in their capacity as athletes under current precedent. In doing so, public university policies prohibiting student athlete protests—such as kneeling and wearing *certain* non-uniform gear on game day—will be deemed unconstitutional under *West Virginia State Board of Education v. Barnette* and *Tinker*.

Part I of this Note explores the rich history of protest in professional and amateur athletics, which paved the way for social justice protests in collegiate sports today. Part I will also explore relevant scholarship and present the open question facing the Supreme Court with respect to student athlete free speech rights in game play. Part II of this Note explores First Amendment doctrine and collegiate student athlete free speech precedent. Part III of this Note applies student free speech jurisprudence to modern exemplars, such as kneeling during the anthem and wearing non-uniform gear during warm-ups and throughout games. Part III predicts that, should the Supreme Court face this open question, the Court will protect student athletes' right to kneel during the national anthem under *Barnette* and *Tinker*. Likewise, the Supreme Court will protect certain non-uniform gear under *Tinker* but subject to *Bethel School District No. 403 v. Fraser* and *Morse v. Frederick*. This Note briefly concludes, summarizing the public university student athlete's constitutional right to protest on game day.

I. PROTEST IN AMERICA IS NOTHING NEW, THOUGH QUESTIONS ON THE CONSTITUTIONALITY OF PROTEST IN COLLEGIATE ATHLETICS REMAIN UNANSWERED

Across many platforms, discussions and protests have erupted in light of social justice issues in America, especially surrounding recent killings of Black Americans.[11] It has become increasingly common to see athletes, both professional and amateur, use their platforms to discuss these highly relevant social and racial justice issues. Subsequently, there has been strong opposition in response to protests and demonstrations at athletic events, that centers on the argument that athletes should instead simply "stick to sports."[12] However, those in opposition may not understand and certainly do not appreciate the long and rich history of protest in athletics. Athletes throughout history have been using their platforms to shed light on difficult realities surrounding social and racial

10. *Id.*

11. Wyche, *supra* note 1; *see also* Amy O'Kruk, *A Look at Police Brutality in America*, NBC BOS. (July 1, 2020), https://www.nbcboston.com/news/national-international/a-look-at-police-brutality-in-america/2152297.

12. Armando Salguero, *Dear Sports: Stick to Sports*, MIA. HERALD (Oct. 1, 2017), https://www.miamiherald.com/sports/spt-columns-blogs/armando-salguero/article176389926.html.

inequality in their communities, global human rights violations, anti-war viewpoints, and more.[13]

Outcries in professional and amateur athletics to social injustice and racial inequity are commonly seen in America's history.[14] Jackie Robinson wrote in his autobiography, "I cannot stand and sing the anthem. I cannot salute the flag; I know that I am a black man in a white world."[15] Colin Kaepernick shocked conservative America, first sitting and later kneeling in protest against police brutality and racism in America.[16] Although Kaepernick's protest against racial injustice is not a new position for an athlete to take, conservative America has been up in arms, telling athletes to "stick to sports"[17] and to "shut up and dribble."[18] As Armando Salguero of the Miami Herald ironically exclaimed, "[i]t's sad that in 2017 America[,] that's a controversial stance."[19] But *what* is sadly deemed "that controversial stance?" As Salguero puts it, it is not sad that in America in 2017 (and today), that systemic racism,[20] police brutality,[21] and white supremacy[22] pervade the daily experience of people of color in America,[23] but that athletes will not "stick to sports" because—despite Black Americans being murdered at alarming rates[24]—Salguero "just want[s] to relax[,] . . . eat[] a hot dog and watch[] football."[25]

Athletes have famously protested to shed light on issues facing their communities, which recently have surrounded police brutality and racism[26] in

13. Shannon Ryan, *Timeline: A Look Back at Some of the Most Prominent Protests Over the Years*, CHI. TRIB. (Sept. 9, 2020), https://www.chicagotribune.com/sports/ct-athlete-protests-timeline-liststory-20200909-yl4x7b3hk5gkxj5wdxqwdmxfrq-list.html; Nikole Tower, *Olympic Project for Human Rights Lit Fire for 1968 Protests*, GLOB. SPORT MATTERS (Oct. 8, 2018), https://globalsportmatters.com/mexico/2018/10/08/olympic-project-for-human-rights-lit-fire-for-1968-protests; Camilla Bauduin, *The Importance of Athlete Activism and Protest Through Sports*, FRANKLIN POST (Apr. 30, 2018), https://fhspost.com/the-importance-of-athlete-activism-and-protest-through-sports.

14. Wulf, *supra* note 1.

15. JACKIE ROBINSON, I NEVER HAD IT MADE xxiv (HarperCollins Publishers 1995) (1972).

16. Wyche, *supra* note 1.

17. Salguero, *supra* note 12.

18. Emily Sullivan, *Laura Ingraham Told LeBron James to Shut Up and Dribble; He Went to the Hoop*, NPR (Feb. 19, 2018, 5:04 PM), https://www.npr.org/sections/thetwo-way/2018/02/19/587097707/laura-ingraham-told-lebron-james-to-shutup-and-dribble-he-went-to-the-hoop.

19. Salguero, *supra* note 12.

20. Justin Worland, *America's Long Overdue Awakening to Systemic Racism*, TIME (June 11, 2020, 6:41 AM), https://time.com/5851855/systemic-racism-america.

21. *See* O'Kruk, *supra* note 11.

22. Ursula Moffitt, *White Supremacists Who Stormed the US Capitol Are Only the Most Visible Product of Racism*, THE CONVERSATION (Jan. 15, 2021, 8:22 AM), https://theconversation.com/white-supremacists-who-stormed-us-capitol-are-only-the-most-visible-product-of-racism-152295; Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, BRENNAN CTR. FOR JUST. (Aug. 27, 2020), https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law.

23. *See* Wyche, *supra* note 1.

24. Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PROCS. NAT'L ACAD. SCIS. 16793, 16793 (2019).

25. Salguero, *supra* note 12.

26. *See, e.g.*, Wyche, *supra* note 1.

America but historically have included protests against South Africa's apartheid,[27] war,[28] and other causes. In an article on Colin Kaepernick's 2016 protests, Jack Tien-Dana wrote that for America to blatantly ignore such difficult conversations is "an assertion of control, [and] a maintenance of the status quo, no matter how broken it is or how many people it fails."[29] To Colin Kaepernick, "this is bigger than football and it would be selfish on [his] part to look the other way. There are bodies in the street, and people getting paid leave and getting away with murder."[30] The use of a more public facing platform, such as professional and amateur athletics, helps mobilize and inspire local leaders to do the same in their communities.[31] It gives a voice to the voiceless. It empowers communities to fight for change and it provides leaders to look to and follow. Undisputedly, "[r]ace and sports are deeply intertwined."[32]

Social and racial injustices followed by outcries and protests within athletics are nothing new.[33] Today's most common examples of protest in athletics are kneeling during the national anthem,[34] wearing non-uniform gear—such as "Black Lives Matter" shirts[35] and "All Players United" ("APU") wrist bands[36]—and more rarely, non-participation in games or practices.[37]

The modern student athlete is considerably more influential, nationally, than those in decades past. With the rise in national recognition through broadcasting and social media, student athletes have a greater platform than ever before. Likewise, universities draw in substantially more money than ever before from collegiate sports, especially in men's football and basketball. For example,

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27. Tower, *supra* note 13; Bauduin, *supra* note 13.

28. Ryan, *supra* note 13 (highlighting Muhammed Ali's 1966 refusal of the Vietnam War draft).

29. Jack Tien-Dana, *The Fallacy of "Stick to Sports" Has Never Been Clearer*, INSIDEHOOK (June 3, 2020, 12:36 PM), https://www.insidehook.com/article/sports/fallacy-stick-to-sports.

30. Mary Harvey, *Why Activist Athletes Are Needed Today More Than Ever*, WORLD ECON. F. (July 9, 2020), https://www.weforum.org/agenda/2020/07/athlete-activists-needed-more-than-ever.

31. Adam Jude, *How Colin Kaepernick Inspired Activism, Awareness and Seattle Athletes to Speak Out Against Racial Injustice*, SEATTLE TIMES (Aug. 27, 2020, 9:35 AM), https://www.seattletimes.com/pacific-nw-magazine/aug-30-cover-story.

32. James N. Druckman, Adam J. Howat & Jacob E. Rothschild, *Political Protesting, Race, and College Athletics: Why Diversity Among Coaches Matters*, 100 SOC. SCI. Q. 1009, 1010 (2019).

33. *See* Wulf, *supra* note 1.

34. *See* Celine Castronuovo, *NCAA Players Take a Knee During National Anthem*, THE HILL (Mar. 19, 2021, 3:45 PM), https://thehill.com/homenews/news/544076-ncaa-players-take-a-knee-during-national-anthem; Joanne Kavanagh, *Raising Awareness: What Is the Meaning Behind Taking the Knee and Why Is It So Important?*, THE SUN (Feb. 14, 2022, 10:02 AM), https://www.thesun.co.uk/news/11771451/take-a-knee-meaning-history-blm.

35. Caitlin PenzeyMoog, *50 Photos of the Sports World Showing Support for Black Lives*, STACKER (Aug. 4, 2021), https://stacker.com/stories/5115/50-photos-sports-world-showing-support-black-lives; *see also* Kyle Melnick, *With 'Black Lives Matter' Shirts at Issue, These Prep Athletes Experienced the Tension of Activism*, WASH. POST (Mar. 10, 2021), https://www.washingtonpost.com/sports/2021/03/10/with-black-lives-matter-shirts-these-prep-athletes-experienced-tension-activism.

36. Daniel Uthman, *Michigan State to Wear APU Wristbands vs. Minnesota*, USA TODAY: SPORTS (Nov. 30, 2013, 11:55 AM), https://www.usatoday.com/story/sports/ncaaf/2013/11/30/apu-all-players-united-michigan-state-ramogi-huma-wristbands/3790689.

37. Michael McKnight, *How the Missouri Football Protest Changed College Sports Forever*, SPORTS ILLUSTRATED (Nov. 5, 2020), https://www.si.com/college/2020/11/05/missouri-protests-daily-cover.

in 2019, the University of Texas at Austin football program was valued at $1.1 billion,[38] and the University of Louisville men's basketball program raked in $30 million in profits.[39]

Modern student athletes have even shown that their influence can make lasting change in state legislatures. For example, student athlete Kylin Hill, of Mississippi State University's football team, was credited with being the "final push for state lawmakers to change Mississippi's state flag, which up until January 2021 was the last in the nation to retain the Confederate battle emblem."[40]

These protests have provoked significant backlash by school administrations and state legislatures, who have lobbied for preventative and prohibitive policies to effectively silence athlete protest during game day events.[41] Additionally, these institutions have advocated for disciplinary measures against student athletes who have participated in protests.[42] In early 2021, the East Tennessee State University men's basketball team and the University of Tennessee women's basketball team each elected to kneel during the national anthem.[43] Republican State Senators sent a joint signed letter to the Chancellors and Presidents of all Tennessee public universities stating that when the students "put on their uniforms, they are representing the university and even the citizens" of the state.[44] Senator Mark Pody further clarified his position on student athletes' ability to protest when he stated that he and his fellow lawmakers "want those students to have the right to express themselves *when*

38. Brad Crawford, *College Football's 15 Most Valuable Programs in 2019*, 247SPORTS (Apr. 1, 2019), https://247sports.com/LongFormArticle/Alabama-Crimson-Tide-Texas-Ohio-State-Michigan-college-football-most-valuable-programs-130761488/#130761488_9.

39. Chris Smith, *The Most-Valuable College Basketball Teams*, FORBES (Mar. 12, 2019, 6:00 AM), https://www.forbes.com/sites/chrissmith/2019/03/12/the-most-valuable-college-basketball-teams/?sh=6c2730103225.

40. Greta Anderson, *On the Offensive and in the Lead*, INSIDE HIGHER ED (July 2, 2020), https://www.insidehighered.com/news/2020/07/02/athletes-push-and-achieve-social-justice-goals; Veronica Stracqualursi, *Mississippi Ratifies and Raises Its New State Flag over the State Capitol for the First Time*, CNN: POLS. (Jan. 13, 2021, 9:00 AM), https://www.cnn.com/2021/01/12/politics/mississippi-new-state-flag-flown/index.html.

41. Summers, *supra* note 9; Sergio Martínez-Beltrán, *Tennessee GOP Lawmakers Want to Ban Student-Athletes from Kneeling Following ETSU Protest*, WPLN NEWS (Feb. 23, 2021), https://wpln.org/post/tennessee-gop-lawmakers-want-to-ban-student-athletes-from-kneeling-following-etsu-protest.

42. *See* Summers, *supra* note 9; Martínez-Beltrán, *supra* note 41.

43. The Lady Volunteers of the University of Tennessee were seen kneeling during their season opener. Mechelle Voepel, *Most of Tennessee Lady Volunteers Players Kneel During National Anthem in Wake of Capitol Riot*, ESPN (Jan. 7, 2021), https://www.espn.com/womens-college-basketball/story/_/id/30671289/most-tennessee-lady-volunteers-players-kneel-national-anthem-wake-capitol-riot. This was followed by the men's basketball team at East Tennessee State University also taking a knee during the national anthem. Martínez-Beltrán, *supra* note 41; Michael A. Fletcher, *East Tennessee Men's Basketball Players Convinced Their Coach Resigned Because of Kneeling Controversy*, ESPN (Apr. 1, 2021), https://www.espn.com/mens-college-basketball/story/_/id/31178371/east-tennessee-men-basketball-players-convinced-their-coach-resigned-kneeling-controversy.

44. Summers, *supra* note 9.

they're on their own. When they're not representing the state of Tennessee."[45] He equated student athletes and the university to a typical employee and company relationship, asserting that an employee has First Amendment rights when expressing as an individual but must abide by rules and codes of ethics when representing the company.[46] In this open letter to Tennessee public universities, Republican State Senators urged adoption of policies prohibiting student athletes from kneeling during the national anthem.[47] Conversely, Democratic Senator Antonio Parkinson asserts that these "students are simply exercising their right to free speech."[48] Even though student athletes have gained national recognition and influence through their public-facing platforms, student athletes are students first and foremost, and thus should be treated accordingly.[49]

At the intersection of this long-standing, powerful history of athletes refusing to "stick to sports" and some lawmakers urging prohibitions on collegiate student athletes' free speech, the question remains: to what extent can a public university prohibit or police protests when student athletes bear the uniform on game day?[50]

In the context of public high schools, First Amendment scholar Noel Johnson begins to tackle a point of contention between the student athlete's free speech rights on campus and a coach's ability to maintain order and control and to impart developmental skills to his players.[51] Johnson articulates that *Tinker*—a broad sweeping pro-student free speech case discussed at length in Parts II and III of this Note—certainly controls in the athletic context at the high school level, but that the *Tinker* standard should be balanced considering a coach's need to maintain authority and camaraderie.[52] Johnson notes that "[c]omplaints about playing time and coaching methods are a far cry from the bold political statement made by several students in the turbulent 1960s[,]" referencing the political

45. *Id.* (emphasis added).

46. *Id.*

47. Letter signed by Lieutenant Governor Randy McNally, Senator Paul Bailey, Senator Mike Bell and other Republican Senators to the Chancellors and Presidents of the Tennessee Public Universities can be located directly from Senator Paul Bailey's twitter feed, among other sources. Senator Paul Bailey (@PaulBaileyforTN), TWITTER (Feb. 23, 2021, 10:47 AM), https://twitter.com/PaulBaileyforTN/status/1364285667077947396; *see also* Luke Kenton, *All 27 Republicans in Tennessee Senate Sign Letter to the State's Universities Urging Them to PROHIBIT Student Athletes from Kneeling During National Anthem After Men's College Basketball Team Took the Knee Last Week*, DAILY MAIL (Feb. 23, 2021, 5:38 PM), https://www.dailymail.co.uk/news/article-9292229/GOP-Senators-Tennessee-pen-letter-states-universities-urging-ban-kneeling-protests.html.

48. Summers, *supra* note 9.

49. Amanda Carroll, *Students First, Not Athletes*, ATHLETE NETWORK: BLOG https://an.athletenetwork.com/blog/students-first-not-athletes (last visited July 1, 2022).

50. Part II of this Note will set up the legal framework governing student athlete protests. Part III of this Note will show how, under the proper framework, a court will handle these difficult questions and, in most cases, find that the student athlete has the right to protest during game day activities.

51. Noel Johnson, Tinker *Takes the Field: Do Student Athletes Shed Their Constitutional Rights at the Locker Room Gate?*, 21 MARQ. SPORTS L. REV. 293, 293–94 (2010).

52. *Id.* at 314.

backdrop of *Tinker* and the Supreme Court's recognition that "core political speech strikes closer to the heart of the First Amendment . . . ."[53]

Tinker has also received some backlash following a scathing concurrence by Justice Thomas in *Morse*, which called for an abandonment of *Tinker* and student free speech rights at public schools.[54] In light of Thomas' concurrence, First Amendment scholars such as Clay Calvert explored *Tinker*'s apparent midlife crisis as exceptions continually whittle away at *Tinker*'s once powerful latitude.[55] While *Tinker* has been sidestepped in many circumstances, Calvert asserts that *Tinker* still stands today. But it certainly remains at risk should the Supreme Court continue to carve exceptions and ultimately silence *Tinker*.[56]

II. FIRST AMENDMENT JURISPRUDENCE PROTECTING STUDENTS WITHIN THE SCHOOLHOUSE GATE

Under this historic backdrop, the rights of student athletes remain an unanswered question at the Supreme Court when the intersection of student free speech rights and collegiate athletes at public universities converge at game day. To begin to unravel and answer this question, First Amendment jurisprudence, lower court collegiate athlete protest cases, and the legal framework governing student speech will be explored.

The First Amendment fundamentally establishes that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."[57] The First Amendment sets out to protect fundamental rights of the people from government restrictions. Freedom of expression, which includes freedom of speech, is thought to be one of the most fundamental, core matrices of rights that every American enjoys.[58] First Amendment free speech protections include both pure and symbolic speech. This includes protections for verbal and nonverbal expressions where at the core, the "speaker" is communicating or abstaining from communicating some idea.[59]

It is well-established that a public university is a state actor through the Fourteenth Amendment and thus is subject to limitations when disciplining and limiting students' and employees' right to protest while on campus.[60] As the *Tinker* Court famously said, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at

53. *Id.* at 311, 314.

54. Morse v. Frederick, 551 U.S. 393, 410–11 (2007) (Thomas, J., concurring).

55. *See e.g.*, Clay Calvert, Tinker*'s Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U. L. REV. 1167, 1169 (2009).

56. *Id.* at 1191.

57. U.S. CONST. amend. I.

58. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1237 (Rachel E. Barkow et al. eds., 5th ed. 2017).

59. *See generally* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

60. *Tinker*, 393 U.S. at 507 (citing *Barnette*, 319 U.S. at 637).

the schoolhouse gate."[61] This principle has inspired scholars to explore constitutional questions and intricacies within the schoolhouse walls,[62] and for attorneys to vehemently defend students' constitutional rights.[63] These issues have historically resulted in bitter controversy and still remain significant points of contention today.[64]

It is important to understand the current First Amendment framework and obstacles that student athletes may face in order to properly determine the controlling standards and jurisprudence for analyzing collegiate student athlete protest. Subpart A discusses student free speech jurisprudence as it stands today, and Subpart B highlights two collegiate student athlete protests that were challenged in lower courts and how they were framed under existing free speech jurisprudence.

A. THE STUDENT'S FIRST AMENDMENT RIGHT TO PROTEST UNDER THE FREE SPEECH CLAUSE AND ITS LIMITATIONS

There are six key Supreme Court cases that establish how a state may regulate student speech in a public-school setting. *Barnette* established that under compelled speech principles, students cannot be required to stand and pledge allegiance to the flag.[65] Broadly, *Tinker* holds that student speech may be restricted only under the substantial disruption test. *Tinker* controls expression unless the expression is subject to one of the enumerated exceptions. These exceptions come from *Fraser*, *Hazelwood School District v. Kuhlmeier*, and *Morse*. *Fraser* controls speech that is deemed "vulgar, lewd, obscene, and plainly offensive."[66] *Hazelwood* governs what the Supreme Court of the United States deemed "school-sponsored speech,"[67] and *Morse* allows prohibitions on pro-drug rhetoric and violent-threat related speech by students.[68] Finally and most recently, the Supreme Court in *Mahanoy Area School District v. B.L.* unsurprisingly reaffirmed a significant limitation and—relying on *Tinker*—held that a public high school student's off-campus speech stating, "Fuck school fuck cheer fuck softball fuck everything[,]" was largely outside of the school's disciplinary reach, despite the context of the speech relating to the subject of

61. *Id.* at 506.

62. *See generally* JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND (2018).

63. Tinker v. Des Moines - *Landmark Supreme Court Ruling on Behalf of Student Expression*, ACLU, https://www.aclu.org/other/tinker-v-des-moines-landmark-supreme-court-ruling-behalf-student-expression (last visited July 1, 2022).

64. *See* Voepel, *supra* note 43.

65. 319 U.S. at 642.

66. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1176 (9th Cir. 2006); *see also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684–86 (1986).

67. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267–70 (1988).

68. Morse v. Frederick, 551 U.S. 393, 398, 409–10 (2007); *see also* Calvert, *supra* note 55, at 1170.

extracurricular activities.[69] Notably, there are reasonable exceptions to *Mahanoy*'s "geographical" limitation, which turns on a speech's context, such as harassment, bullying, threats, and failure to follow rules concerning lessons among others.[70]

Generally, *Barnette* concerns the ability for students to abstain from participation in patriotic ceremonies but offers no protection for affirmative expression itself.[71] When speech is uttered expressly or symbolically while on campus, *Tinker*, *Fraser*, *Hazelwood*, and *Morse* control. When off-campus speech is disciplined, *Mahanoy* is instructive and controlling.[72] Under *Tinker*, the issue is framed as what student speech a school must tolerate.[73] *Fraser* and *Morse* each determine categories of speech that can be outright barred.[74] However, *Hazelwood* concerns whether a school is required to affirmatively promote or endorse certain student speech, thus conferring more discretion to school administrations to censor student speech.[75]

Before *Barnette*, student free speech rights were significantly limited. It was traditionally understood that schools had a wide breadth of latitude to discipline a student who caused any sort of disturbance or disruption. A wave of student free speech cases swept across the courts after Jehovah's Witnesses shocked the nation and became "unlikely champions" of the First Amendment.[76] In the seminal *Barnette* case, the Barnette sisters had committed apparent "insubordination" by not adhering to the recent school board policy that required all students to stand for the Pledge of Allegiance.[77] The consequence of refusal was being barred from school.[78] The sisters were subsequently informed that

69. B.L. posted to her Snapchat Story an image of herself and another student with the caption "Fuck school fuck softball fuck cheer fuck everything" in response to learning that she had not made her school's varsity cheer team. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2043 (2021). This photo was taken and posted while off campus and outside of school hours. *Id.* at 2042–43. The school was only aware of this photo due to other students viewing the Snapchat Story and bringing it to the cheer coach's attention. *Id.* at 2043. Ultimately, the Supreme Court found that while the language in the speech was vulgar to some, there was little to no disruption as a result and subsequent discipline of B.L. was unconstitutional. *Id.* at 2047–48.

70. *Id.* at 2045.

71. *See* W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

72. Ultimately *Mahanoy* is distinguishable on its facts from the open question discussed in this Note because *Mahanoy* involved off-campus speech, whereas this Note highlights speech occurring while outside of a curricular school setting but certainly not off-campus. However, *Mahanoy* is relevant to this Note for two main purposes. First, it reaffirms that *Tinker* and subsequent cases are still good law and relevant for analytical purposes. Second, Justice Breyer in his majority opinion and Justice Alito in his concurrence offer some important dicta and general treatment of student free speech that will be discussed throughout this Note.

73. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270 (1988).

74. Morse v. Frederick, 551 U.S. 393, 398, 409–10 (2007); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986); *see also* Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 770–72 (5th Cir. 2007) (applying *Morse* in the context of student speech threatening violence against a student body).

75. *Hazelwood*, 484 U.S. at 270–71.

76. Sarah Barringer Gordon, *What We Owe Jehovah's Witnesses*, HIST. NET https://www.historynet.com/what-we-owe-jehovahs-witnesses.htm (last visited July 1, 2022).

77. DRIVER, *supra* note 62, at 62.

78. *Id.*

they were no longer welcomed at their middle school.[79] The Supreme Court determined that compelled speech does not require words to be uttered but can include acts against one's will, which includes compelling a student to participate in the Pledge of Allegiance.[80] As it stands today, it is unconstitutional to require a student to stand for patriotic ceremonies.[81] It should be noted that *Barnette* does not stand to confer any affirmative right to express a viewpoint. Rather, *Barnette* simply asserts that a student cannot be compelled to stand, as it is a form of compelled speech antithetical to free speech values.

On the other hand, when a student expresses a particular viewpoint while in a public-school setting, *Tinker*, *Fraser*, *Morse*, and *Hazelwood* control. Under the *Tinker* standard—also known as the "substantial disruption" test—public school administration "cannot infringe on their students' right to free and unrestricted expression . . . under the First Amendment to the Constitution, where the exercise of such rights in the school buildings and schoolrooms do not *materially and substantially interfere* with the requirements of appropriate discipline in the operation of the school."[82] The *Tinker* Court adopted this standard from the Fifth Circuit's decision in *Burnside v. Byers* and extended it by stating, "undifferentiated fear or *apprehension of disturbance* is not enough to overcome the right to freedom of expression."[83] Even when statements by students "may start an argument or cause a disturbance . . . our Constitution says we must take that risk . . . ."[84] From a policy perspective, the Court noted that "our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society."[85]

In *Tinker*, students were disciplined by their school for electing to wear a plain black armband during school hours, which symbolized their protest against the Vietnam War.[86] When the principal caught wind of plans to protest, he announced a school policy stating that students who wore the armbands would be asked to remove it.[87] The policy further stated that if a student refused to adhere to a removal request, the student would be suspended.[88] The Tinker children and others wore these armbands and after refusing to remove them,

79. *Id.*

80. W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

81. *Id.*

82. Burnside v. Byers, 363 F.2d 744, 749 (5th Cir. 1966) (emphasis added); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509, 514 (1969) (citing *Burnside*).

83. *Tinker*, 393 U.S. at 508 (emphasis added).

84. *Id.*

85. *Id.* at 508–09.

86. *Id.* at 504.

87. DRIVER, *supra* note 62, at 74.

88. *Id.*

were suspended and could not return to school until after the demonstration was planned to end—a period of roughly two weeks.[89]

The Court ruled in favor of the Tinker children and established broad protection for students, within reason, holding it unconstitutional to discipline students exercising their First Amendment rights.[90] The Supreme Court found it especially important that the protest did not interfere with the educational mission of the school nor detract from any other students' rights in the process.[91]

While schools had traditionally been given wide latitude to maintain authority and discipline students in carrying out their educational mission, the *Tinker* Court conferred significant power to students.[92] Thus, the *Tinker* Court held that a public school and its affiliates cannot discipline or restrict student speech unless the speech would cause *actual* substantial disruption to others.[93] The *Tinker* Court articulated another standard that has not been tested at length but stands to hold that student speech may not invade the rights of others, and thus subsequent discipline for such speech would be sanctioned.[94]

Tinker stood unchallenged for roughly fifteen years, until the Supreme Court considered constitutional questions raised by a crude assembly speech by a bold middle schooler that left his school's administrators shocked and quite displeased.[95] As a result of *Fraser*, the first *Tinker* exception was enumerated.

In *Fraser*, a student delivered a sexually charged speech, utilizing numerous graphic innuendos, during a student body assembly at his middle school.[96] The assembly room, with upwards of 600 students, erupted, "hooted and yelled" and even resulted in some students gesturing graphically and "simulated . . . sexual activities pointedly alluded to in [his] speech."[97] The student was subsequently disciplined and suspended from school.[98] The *Fraser* Court determined that the First Amendment does not protect such lewd and plainly offensive speech, drawing from the Manual of Parliamentary Practice, which was adopted by the House of Representatives and the Senate.[99] The Court stated that it can hardly be the case that "what is proscribed in the halls of Congress is beyond the reach of school officials to regulate[.]"[100] Thus, a line was drawn in the sand, supporting restrictions on student speech that would be considered "highly offensive to most citizens."[101]

89. *Tinker*, 393 U.S. at 504; *see also* DRIVER, *supra* note 62, at 74.
90. *Tinker*, 393 U.S. at 514.
91. *Id.*
92. DRIVER, *supra* note 62, at 73.
93. *Tinker*, 393 U.S. at 513.
94. *See Tinker*, 393 U.S. at 513; Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1177–78 (9th Cir. 2006) (citing *Tinker*, 393 U.S. at 509).
95. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 678–79 (1986).
96. *Id.* at 677–78.
97. *Id.*
98. *Id.* at 678–79.
99. *Id.* at 681–82.
100. *Id.* at 682.
101. *Id.*

Subsequent lower court cases followed the *Fraser* standard, upholding bans on profane speech, clothing displaying offensive remarks, and students displaying the Confederate flag on school grounds. An example includes a district court upholding disciplinary measures under *Fraser* for shirts displaying "Drugs Suck!," finding that the connotation of "suck" can be deemed lewd and sexual in nature.[102] That court noted that restrictions on potentially lewd language must be taken "in light of the special characteristics of the school environment."[103] Thus, among sixth, seventh, and eighth grade students, it was reasonable for the school to restrict the t-shirt choice.[104] So, arguably, in the context of older and thus more mature students, such a restriction would not be supported.[105]

Additionally, a shirt adorned with the word "BELIEVE" with "LIE" highlighted in red along with "Marilyn Manson" aside a three-headed Jesus figure was deemed "contrary to the educational mission of the school."[106] While the dissent was concerned about implications of viewpoint discrimination, the majority held that it was well within the school's latitude to prohibit the message promoted by the shirt—an apparent "pro-drug persona" held by Manson.[107]

Notably, the Confederate flag was deemed plainly offensive under *Fraser*'s standard, and schools are within their right to prevent the presence of the flag on campus.[108] As the Eleventh Circuit put it, the Confederate flag evokes choice words such as "symbol, heritage, racism, power, slavery, and white supremacy," which are deemed "highly emotionally charged," yielding "[r]eal feelings—*strong* feelings."[109] Reasonably so, the court was concerned with the "unhealthy and potentially unsafe learning environment" that would occur should the Confederate flag be allowed on school grounds.[110]

In effect, *Fraser* held that student speech can be deemed plainly offensive, lewd, or vulgar based on factors, such as the community in which the message is given,[111] the public perception of the meaning of certain profane or vulgar words,[112] and if the message *could* have the potential to be disruptive to the mission of the school.[113]

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102. Broussard v. Sch. Bd. of Norfolk, 801 F. Supp. 1526, 1528, 1537 (E.D. Va. 1992).

103. *Id.* at 1537 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

104. *Broussard*, 801 F. Supp. at 1537.

105. *See id.*; Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2049 n.2 (Alito, J., concurring) ("[*Mahanoy*] does not involve speech by a student at a public college or university. For several reasons, including the age, independence, and living arrangements of such students, regulation of their speech may raise very different questions from those presented here. I do not understand the [*Mahanoy*] decision . . . to apply to such students.").

106. Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 467, 471 (6th Cir. 2000).

107. *Id.* at 470.

108. Scott v. Sch. Bd. of Alachua Cnty., 324 F.3d 1246, 1249 (11th Cir. 2003).

109. *Id.* (emphasis added) (internal quotations omitted).

110. *Id.* at 1247.

111. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682–83 (1986); Broussard v. Sch. Bd. of Norfolk, 801 F. Supp. 1526, 1537 (E.D. Va. 1992).

112. *Broussard*, 801 F. Supp. at 1537.

113. *Scott*, 324 F.3d at 1248.

Not a far step from values expressed in *Fraser*, the Supreme Court in *Morse* held that schools have the absolute right to prohibit pro-drug related rhetoric during school sanctioned events.[114] In this instance, a student unfurled a banner displaying "BONG HiTS 4 JESUS" while off campus during the 2002 Olympic Torch Relay as it passed through Juneau, Alaska.[115] The students were allowed to attend the Olympic Torch Relay during school hours and were being supervised by school officials, namely the principal.[116] The Supreme Court stressed that political speech is "at the core of what the First Amendment is designed to protect."[117] However, even under such circumstances, there is a compelling interest in deterring drug use by schoolchildren where allowing student speech to celebrate its use—while at a school event—would reasonably pose serious difficulties for those entrusted with the care and development of children.[118] Thus, the Supreme Court found a new bright line, separate from *Tinker* and *Fraser*, that schools may discipline students for pro-drug speech on and off campus at school sanctioned events.[119]

Morse further articulated that *Tinker* still held that schools "may not prohibit student speech because of undifferentiated fear or apprehension of disturbance or a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[120] Instead, *Morse* held that a school's concerns around student drug abuse prevention extend "well beyond an abstract idea to avoid controversy" and thus can be restricted.[121]

The Supreme Court limited *Morse*'s application to the prevention of pro-drug rhetoric on school grounds and at school sanctioned events.[122] Since its inception, *Morse* has been expanded by lower courts as a method for "automatically squelch[ing] student speech that allegedly threatens violence."[123] One such instance includes the Fifth Circuit upholding school discipline for a student's self-proclaimed work of fiction that starkly resembled "a Columbine-style attack on a school."[124] The Fifth Circuit sidestepped *Tinker*, finding that the substantial and material disruption test was inadequate to address free speech questions on violence and mass shootings in schools.[125] The Fifth Circuit found that, similar to concerns of the dangers of drugs on youth development, discipline in response to speech expressing potential violence and mass

114. Morse v. Frederick, 551 U.S. 393, 410 (2007).

115. *Id.* at 397.

116. *Id.* at 396–97.

117. *Id.* at 403 (quoting Virginia v. Black, 538 U.S. 343, 365 (2003) (plurality opinion)).

118. *Id.* at 407–08.

119. *Id.* at 410.

120. *Id.* at 408 (internal quotations omitted) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508, 509 (1969)).

121. *Id.* at 408–09.

122. Calvert, *supra* note 55, at 1170.

123. *Id.* at 1169.

124. Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 766 (5th Cir. 2007); *see also* Calvert, *supra* note 55, at 1170.

125. *Ponce*, 508 F.3d at 770–71.

shootings in schools should be construed under *Morse*.[126] Today, *Morse* stands to bar pro-drug and violent-themed speech.[127]

Speech subject to *Tinker*, *Fraser*, and *Morse* requires consideration of whether the school must *tolerate* a particular type of student speech.[128] Conversely, under *Hazelwood*, speech can be censored if the circumstances and manner of the speech would give the perception that the school is affirmatively promoting or accepting a student's speech, among other factors.[129]

Hazelwood asserts that a school may affirmatively censor student speech in certain, yet broad, circumstances.[130] *Hazelwood* involved middle school-aged students who were enrolled in a journalism course where, as a part of unit completion, the students would write stories for their school newspaper, *Spectrum*.[131] The school unilaterally elected to remove two of the six total pages set for publication that involved topics on teen pregnancy and divorced parents.[132] The students sought relief in court, claiming that their First Amendment rights were violated on account of the school's censorship.[133]

The Court stated that regulations can be imposed to ensure that the students are learning what a course or activity is designed to teach.[134] The Court further stated that the contents of *Spectrum*, for example, should not be inappropriate for the audience, and "that the views of the individual speaker are not erroneously attributed to the school."[135] This included "associat[ing] the school with any position other than neutrality on matters of political controversy."[136] The *Hazelwood* Court justified this departure from *Tinker* in finding that the school's journalism course "may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart knowledge or skills to student participants and audiences."[137]

This authority can extend to "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[138] This concept has been reinforced in cases following *Hazelwood* where the public might have the impression that the school is endorsing speech that occurred

126. *Id.* at 771–72.
127. Calvert, *supra* note 55, at 1170.
128. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270–71 (1988).
129. *Id.*
130. *See generally id.*
131. *Id.* at 262–63, 268.
132. *Id.* at 264.
133. *Id.*
134. *Id.* at 271.
135. *Id.*
136. *Id.* at 272.
137. *Id.* at 271.
138. *Id.*

during *curricular* activities.[139] In an Eleventh Circuit case, the court considered whether a school sanctioned extracurricular mural painting project could be considered curricular.[140] The court considered two factors.[141] The first was whether the activity occurred under the supervision of faculty, and second was whether the activity was designed to give students or audiences particular knowledge or skills.[142] The court found that, although the activity was outside of school hours and voluntary, there was sufficient evidence that the activity was supervised by a faculty member—a teacher—and artistic skills and self-expression were imparted to students.[143] Thus, that court found the mural activity sufficiently curricular under *Hazelwood*.[144]

Under *Hazelwood*, there is greater discretion and deference to the school when censorship is of student speech that could be perceived by the public as endorsed or accepted by the school, that is, school-sponsored speech.[145] Undoubtedly, *Hazelwood*'s broad discretionary latitude can certainly present issues for a student athlete participating in protest.

In relevant First Amendment jurisprudence, it is important to highlight that courts have frequently dispelled concerns that requiring schools to allow certain affinity groups on campus and school-related clubs would have the effect of conveying school approval of such messages.[146] The Supreme Court has rejected the notion that allowing military recruiters on campus in *Rumsfeld v. Forum for Academic and Institutional Rights* conveys school acceptance of military practices,[147] and equally rejected that a student organization's own newspaper print in *Rosenberger v. Rector & Visitors of the University of Virginia* would be attributable to the school's own values.[148]

In response to *Hazelwood*, some states have enacted statutes that effectively supersede the school's wide discretionary latitude under this precedent.[149] These statutes have been dubbed "anti-*Hazelwood*" laws.[150] At least six states have enacted anti-*Hazelwood* statutes including Kansas, Arkansas, California, Iowa, Massachusetts, and Colorado.[151]

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139. Bannon v. Sch. Dist. of Palm Beach Cnty., 387 F.3d 1208, 1214 (11th Cir. 2004); R.O. v. Ithaca City Sch. Dist., No. 5:05-CV-695, 2009 WL 10677063, at *18 (N.D.N.Y. Mar. 24, 2009).

140. *Bannon*, 387 F.3d at 1214–15.

141. *Id.* at 1214.

142. *Id.*

143. *Id.* at 1215.

144. *Id.* at 1214–15.

145. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270–71 (1988).

146. *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 841–42 (1995); Rumsfield v. F. for Acad. & Inst. Rts., Inc., 547 U.S. 47, 65 (2006).

147. 547 U.S. at 65.

148. 515 U.S. at 841.

149. Mike Hiestand, *Understanding "Anti-Hazelwood" Laws*, NAT'L SCHOLASTIC PRESS ASS'N, http://studentpress.org/nspa/its-the-law-understanding-anti-hazelwood-laws (last visited July 1, 2022); *see also* Pyle v. S. Hadley Sch. Comm., 861 F. Supp. 157, 166–68 (D. Mass. 1994).

150. Hiestand, *supra* note 149.

151. *Id.*

B. THE COLLEGIATE ATHLETE: AN UNANSWERED QUESTION AT THE SUPREME COURT

To date, the Supreme Court has not decided whether students at public universities have the constitutional right to protest in their capacity as athletes. Some lower courts have begun to contemplate this question. The Tenth Circuit and a District Court in Kansas each heard cases involving disciplinary action taken against collegiate athletes who have protested in their athletic capacity.

In *Williams v. Eaton*, the Tenth Circuit addressed the issue of whether the University of Wyoming had a right to prohibit student athletes from protesting and thereby the right to dismiss the athletes from the team as a result of noncompliance.[152] There, Black athletes on the University's football team intended to wear black armbands in protest of "alleged inhuman racist policies of the Church of Jesus Christ of Latter Day Saints [the Mormon Church] . . . ."[153] These students presented a set of demands to the football coaching staff, which included (1) ceasing any financial interest in hosting game play with schools affiliated with the Mormon Church, namely Brigham Young University (BYU); (2) requiring athletic directors in their conference to refuse to schedule with BYU; (3) allowing Black athletes to protest during any contest with BYU as long as the Mormon Church maintains their alleged inhuman, racist policies; and (4) requesting that "all white people of good will, athletes included, protest with their Black fellows" and wear a black armband as a symbol of that protest.[154]

The Tenth Circuit addressed the constitutional implications of disciplining student athletes who participated in that protest under the *Tinker* standard.[155] The circuit court noted that it was lawful for the University to limit and subsequently discipline the student athletes' protest because, under the neutrality requirement of the Free Exercise Clause, it would be equally violative to permit such a protest.[156] The court focused on religious expression of BYU affiliates as a key component of this case.[157] The consequence of supporting the demands in this protest—condemning Mormon ideologies of BYU—would be a public university, a state actor, disparaging religion.[158] However, the court did not go that far. Invoking the lesser-known *Tinker* standard, the protest was considered hostile expression invading the rights of others.[159] Thus, the Tenth Circuit upheld disciplinary action taken against the student athletes as constitutional under *Tinker*.[160]

152. 468 F.2d 1079, 1080 (10th Cir. 1972).
153. Williams v. Eaton, 310 F. Supp. 1342, 1344 (D. Wyo. 1970).
154. *Id.*
155. *Williams*, 468 F.2d at 1083.
156. *Id.*
157. *Id.* at 1083–84.
158. *Id.* at 1083.
159. *Id.* at 1084.
160. *Id.*

A decade and a half later, the United States District Court for the District of Kansas heard *Hysaw v. Washburn University*, addressing, in part, whether Washburn University violated the constitutional rights of student athletes who participated in protests by removing them from their athletic team.[161] Black athletes protested racial mistreatment while attending the public university and playing for the Washburn University football team.[162] The protest resulted in student athletes missing practices and positional meetings, which were required as a condition for their athletic scholarships while attending the University and playing on its football team.[163] However, by coaching staff policy, missed practices and positional meetings were considered excused in light of their protest.[164] While the University alleged that the protests caused substantial disruption to other players on the team, the court did not agree.[165] The court stated that "it stretches the imagination to envision how an absence allegedly sanctioned by the coaching staff could be disruptive."[166] The court further found that it "[would] not place the interests of participants in a university extracurricular activity above the rights of any citizen to speak out against alleged racial injustice without fear of government retribution."[167]

Williams and *Hysaw* are marked examples where collegiate athlete protests have been subject to scrutiny in court. However, scholarship has not addressed how the Supreme Court will treat collegiate athletes exercising their First Amendment rights during game day activities.

III. THE PUBLIC UNIVERSITY STUDENT ATHLETE HAS A CONSTITUTIONAL RIGHT TO PROTEST ON GAME DAY

This Part explores how current First Amendment jurisprudence would treat a student-athlete protest that involves kneeling during the national anthem and wearing non-uniform gear during pre-game and gameplay.

A. STUDENT ATHLETES ARE STUDENTS FIRST AND FOREMOST WHILE ATTENDING PUBLIC UNIVERSITY, AND THUS HOLD THE RIGHTS AND PROTECTIONS OF STUDENTS AND LIKEWISE ESCAPE THE BURDENS OF EMPLOYEE STATUS

A university may attempt to assert in court that student athletes should be subject to the more restrictive employee free speech framework because of their status and contractual scholarship obligations, echoing the arguments posed by Republican lawmakers.[168] A court is likely to disagree with the university's

161. 690 F. Supp. 940, 946 (D. Kan. 1987).
162. *Id.* at 945–46.
163. *Id.* at 946.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. Summers, *supra* note 9.

stance for two reasons and, instead, find that the proper framework for a student athlete should be construed under a similarly situated non-student athlete on campus. First, under limited student athlete free speech cases, lower courts have consistently, and without question, analyzed the student athletes' rights under student speech jurisprudence.[169] Second, student athletes have petitioned the courts for the benefits of employee status, such as minimum wage, but are continually denied those benefits.[170] It would be wrong to say that student athletes cannot gain the benefits of employee status but must instead suffer the burdens.

Very few collegiate student athlete protests have made their way to court. In the few that have, lower courts have used the student free speech precedent in their analysis.[171] Specifically, *Hysaw* and *Williams* each analyzed free speech concerns under the *Tinker* framework to determine whether a particular student athlete was rightfully disciplined for engaging in protest.[172] These two cases emerged in the 1970s and 80s.

Student athletes have even attempted to gain employee status, but denial of those benefits have been upheld by the courts.[173] In California, former University of Southern California football player Lamar Dawson petitioned the courts for employee-benefit status.[174] Dawson claimed that the high revenue generating status of his sport weighed in his favor, but the Northern District of California disagreed, stating that "the premise that revenue generation is determinative of employment status is not supported by the case law."[175] In interpreting the Fair Labor Standard Act and applying its economic realities test, the Northern District found that Dawson's scholarship did not create an expectation of compensation, thus granting defendants—the National Collegiate Athlete Association and the Pac-12—their motion to dismiss.[176] Relying on a decision out of the Seventh Circuit,[177] the court noted, "[s]imply put . . . student-athletic *play* is not *work*, at least as the term is used in the FLSA."[178] The Ninth

169. *See generally* Williams v. Eaton, 468 F.2d 1079 (10th Cir. 1972); Hysaw v. Washburn Univ., 690 F.Supp. 940 (D. Kan. 1987).

170. Berger v. Nat'l Collegiate Athletic Ass'n, 843 F.3d 285, 294 (7th Cir. 2016); *see also* Dawson v. Nat'l Collegiate Athletic Ass'n, 932 F.3d 905, 913–14 (9th Cir. 2019).

171. *See generally Williams*, 468 F.2d 1079; *Hysaw*, 690 F. Supp. 940.

172. *See generally Williams*, 468 F.2d 1079; *Hysaw*, 690 F. Supp. 940.

173. *See, e.g.*, *Berger*, 843 F.3d at 294; *see also Dawson*, 932 F.3d at 913–14.

174. *See generally Dawson*, 932 F.3d 905; Dawson v. Nat'l Collegiate Athletic Ass'n, 250 F. Supp. 3d 401 (N.D. Cal. 2017).

175. *Dawson*, 250 F. Supp. 3d at 407; *see also* Kyle Bonagura, *Ex-USC Player Lamar Dawson's Lawsuit Against NCAA, Pac-12 Dismissed*, ESPN (Apr. 25, 2017), https://www.espn.com/college-sports/story/_/id/19242998/ex-usc-football-player-lamar-dawson-lawsuit-ncaa-pac-12-dismissed.

176. *Dawson*, 250 F. Supp. 3d at 403.

177. The Northern District of California relied on a 2016 decision that found student athletes were not entitled to the benefits of employee status under the Fair Standards of Labor Act. *See generally Berger*, 843 F.3d 285.

178. *Dawson*, 250 F. Supp. 3d at 405 (internal quotations omitted) (emphasis added) (quoting *Berger*, 843 F.3d at 293).

Circuit then heard Dawson's case and upheld the lower court's finding.[179] As it stands today, student athletes are not considered employees.[180]

The future remains somewhat unclear and could drastically change the current student athlete analytical framework discussed in Part II. In the summer of 2021, the Supreme Court heard *Alston*, an anti-amateurism requirement petition under a theory of anti-competitive market restraints.[181] Most concernedly, terminating the amateurism requirement could change the way courts analyze student athlete protests and, thus, could mean that student athletes in their athletic capacity would no longer reap the benefits that *Tinker* currently provides. Instead, student athletes could be subject to employee free speech jurisprudence. While there was an effective end to the amateurism requirement, nothing in the opinion implies or expressly finds that the student athlete is now an employee of the University.[182] The fact remains that the student athlete does not have the benefits of employee status, and thus they cannot be silenced with the burdens of the employee status.

B. THE GREATEST OBSTACLE FOR TODAY'S STUDENT ATHLETE: OVERCOMING *HAZELWOOD*

A university will likely contend that *Hazelwood* is the proper framework to analyze game day protest, given that it has the broadest reach to restrict student speech. While courts have often applied *Hazelwood* to mostly student newspapers and similar publications, *Hazelwood* does have language in its own opinion that could be construed quite favorably for a university. The *Hazelwood* Court stated that school-sponsored speech can be found in "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[183] Additionally, a university would likely argue that students who bear the name of their university on their chest are representatives of the school. Thus, subsequent expression by student athletes in uniform could be perceived as accepted or promoted by the school, as was the concern in *Hazelwood*.[184] This concern was highlighted by Republican lawmakers,

179. *Dawson*, 932 F.3d at 913–14.

180. Press Release, Donald Remy, NCAA Chief Legal Off., NCAA Responds to Union Proposal, https://www.ncaa.org/about/resources/media-center/press-releases/ncaa-responds-union-proposal [https://web.archive.org/web/20210603095919/https://www.ncaa.org/about/resources/media-center/press-releases/ncaa-responds-union-proposal] (last visited July 1, 2022).

181. *See generally* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021); *see also* Nina Totenberg, *Take to the Court: Justices Will Hear Case on Student Athlete Compensation*, NPR (Mar. 31, 2021, 5:00 AM), https://www.npr.org/2021/03/31/982836334/take-to-the-court-justices-will-hear-case-on-student-athlete-compensation; Amy Howe, *Justices Employ Full-Court Press in Dispute over College Athlete Compensation*, SCOTUSBLOG (Mar. 31, 2021, 5:33 PM), https://www.scotusblog.com/2021/03/justices-employ-full-court-press-in-dispute-over-college-athlete-compensation.

182. *See generally Alston*, 141 S. Ct. 2141.

183. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

184. *See id.*

asserting that student athletes are representatives of the school and even of the state.[185]

Generally, when a court finds that certain student expression may "bear the imprimatur of the school," a court will identify whether the activity in question is curricular.[186] To define "curricular," the *Hazelwood* Court articulated that "[t]hese activities may be fairly characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."[187] Specifically, "curricular" is defined as (1) supervised by faculty, and (2) imparting specific skills to the participant or the audience.[188] It is clear from *Hazelwood* and subsequent lower court cases that nontraditional activities outside of the classroom can be deemed curricular and are determined on the facts of each case.[189]

In the context of game day protests by student athletes, there are two significant hurdles that a university must overcome in order for *Hazelwood* to control. First, there is reasonable room for disagreement on whether game day protest would bear the imprimatur of the school. As the Supreme Court found in *Rosenberger*, a school's requirement to allow a school student club's expression—even in direct affiliation with the school—could not be argued as giving the public a perception of school endorsement.[190] It follows from this reasoning that it is unreasonable to argue that expression by a school-affiliated athlete or team gives the perception of school approval of that expression.[191]

However, even if a court were convinced that a student athlete's expression was sufficient to give public perception of school endorsement, game day activities will fail to meet the curricular requirement for applying *Hazelwood*.[192]

It can hardly be disputed that athletics impart skills to a participant. Athletics teach time management, teamwork, and discipline, to name a few. It can also hardly be disputed that public university athletic departments and their staff—not faculty members—are the responsible supervisors of their athletes while in their athletic capacity. There are few examples of athletic staff at universities also holding a position as a faculty member. Absent such rare circumstances, it cannot be held that game day activities are curricular and subject to *Hazelwood*. With two significant hurdles for universities to overcome—faculty supervision and public perception of school approval—a court will likely look to the seminal First Amendment cases, *Barnette*, *Tinker*,

185. Summers, *supra* note 9.
186. *Hazelwood*, 484 U.S. at 271.
187. *Id.*
188. *Id.*
189. *Id.*; *see also* Bannon v. Sch. Dist. of Palm Beach Cnty., 387 F.3d 1208, 1215 (11th Cir. 2004).
190. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 841–42 (1995).
191. *See id.*
192. *See Hazelwood*, 484 U.S. at 271.

Fraser, and *Morse* for guidance on what is considered a reasonable restriction against student athletes.

But even if the Court were convinced that *Hazelwood* standards could be met, the fact remains that a "bedrock principle" of the First Amendment is that "speech may not be suppressed simply because it expresses ideas that are 'offensive or disagreeable.'"[193] More recently, game day protests have been related to Black Lives Matter and racial injustice, both of which are political speech. In other words, it would seem to fall into a category of speech beyond the school's regulatory reach because it "is not expressly and specifically directed at the school, school administrators, teachers, or fellow students" and instead addresses "matters of public concern."[194] Use of *Hazelwood*, given the age and independence of adult collegiate athletes, would circumvent the First Amendment's bedrock principles and thus, as political speech, should be properly analyzed under *Barnette*, *Tinker*, *Fraser*, and *Morse*.

C. UNDER THE PROPER STANDARDS, STUDENT ATHLETES WILL BE ABLE TO PROTECT THEIR CONSTITUTIONAL RIGHT TO PROTEST AS STUDENTS DURING GAME DAY EVENTS WITHIN REASON

Given that *Hazelwood* would not and should not be deemed the proper framework for examining student athlete protest, courts will turn to *Barnette* for the student athletes' right to kneel during the national anthem and in the alternative, to *Tinker.* Courts will analyze non-uniform gear under *Tinker* unless subject to *Morse* and *Fraser*. Under such analyses, courts will protect collegiate student athletes' constitutional right to protest, within reason.

1. Protecting the Student Athlete's Right to Kneel During the Anthem

In protecting the student athlete's right to kneel during the national anthem, courts will first look to *Barnette* and in the alternative to *Tinker*. *Barnette* will control in circumstances where courts find that kneeling is no different than simple nonparticipation in patriotic events under compelled speech principles. Likewise, *Tinker* will control in circumstances where a court finds that kneeling presents its own affirmative message and viewpoint.

Under *Barnette* precedent, a court will likely find that a student athlete at a public university cannot be compelled to stand or remain standing for the national anthem.[195] It is without a doubt that standing for the national anthem is considered a patriotic act with significant pro-military undertones.[196] Not only did the Supreme Court state in *Barnette* that requiring students to pledge

193. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2055 (2021) (Alito, J., concurring) (citations omitted).

194. *Id.*

195. *See* W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624, 641–42 (1943).

196. J.G. Noll, *Here's What the Military Community Is Saying About the National Anthem Protest*, MILSPOUSEFEST, https://stg.milspousefest.com/heres-military-community-saying-national-anthem-protest (last visited July 1, 2022).

allegiance to the flag would be considered as compelled speech, but it went further to state that requiring participation in patriotic ceremonies generally would also be considered as compelled speech.[197] The Court addressed opposing concerns noting, "[t]o believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds."[198] The Court further articulated that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[199]

The Pledge of Allegiance and the national anthem are substantially similar, and both ask the audience to stand, face the American flag, and either state a pledge or stand in silence.[200] The Free Speech Clause generally protects an individual's right to speak their own mind and extends to protect an individual from being required to speak against their will.[201] Compelled speech jurisprudence additionally does not require actual words to be spoken but includes expressive, non-verbal acts against an individual's will.[202]

A court will have little difficulty finding that compelling a student to stand for the national anthem is no different than compelling a student to stand for the Pledge of Allegiance.[203] Thus, a policy or rule implemented by public universities to require student athletes to stand during the national anthem would be deemed unconstitutional under the First Amendment in following *Barnette*.[204]

While it seems clear that a university could not force a student athlete to participate and stand during patriotic ceremonies under *Barnette*, a court may be compelled to find that kneeling sends its own affirmative message, separate from simple nonparticipation. To apply *Tinker*, a court would first need to determine whether the expression made by kneeling is subject to an exception under *Fraser* or *Morse*.

Student athletes have taken a knee in recent years during the national anthem to shed light on racial inequality, police brutality, and violence towards people of color in America.[205] The *Fraser* Court determined that lewd, vulgar,

197. *Barnette*, 319 U.S. at 642.

198. *Id.*

199. *Id.*

200. Conduct expected during the national anthem is well-known but additionally codified in 36 U.S.C. § 301. Similar conduct codification for the Pledge of Allegiance is found at 4 U.S.C. § 4.

201. *Barnette*, 319 U.S. at 634.

202. *Id.* at 632–33.

203. *See id.* at 633.

204. *See id.* at 642.

205. Victor Mather, *Kentucky's Team Took a Knee. Some in the State Were Taken Aback.*, N.Y. TIMES (Apr. 23, 2021), https://www.nytimes.com/2021/01/12/sports/ncaabasketball/kentucky-basketball-kneeling.html; Wyche, *supra* note 1.

or plainly offensive language can be prohibited on school campuses.[206] Here, there is no significant lewd or vulgar undertone expressed by kneeling. A court will not deem a viewpoint lewd, vulgar, or plainly offensive, solely on grounds that it is considered "unpopular" for the political message it bears.[207] Likewise under *Morse*, it can hardly be said that kneeling is a promotion of violence itself or pro-drug rhetoric.[208] Thus, the proper framework for protecting an affirmative viewpoint would be found under *Tinker*.

A court will undoubtedly find that under *Tinker*, kneeling does not substantially and materially interfere (1) "with the requirements of appropriate discipline in the operation of the school" or (2) with the rights of others during game day activities.[209] While communities have responded with anger on social media and are displeased by student athletes' choice to kneel, no disruption by fans or athletes to the normal course of game play have occurred to date. Kneeling expresses no pointed attack towards others and does not interfere with the rights of others. Kneeling peacefully expresses a desire for people of color to be seen and heard, and for justice. Thus, a court will find that *Tinker* certainly protects the affirmative message expressed by kneeling.[210]

2. Protecting the Student Athlete's Right to Wear Certain Non-Uniform Gear During Game Day Activities

Student athletes additionally have the constitutional right to wear *certain* non-uniform gear during games and warm-ups. In analyzing these cases, courts will look to *Tinker*'s substantial disruption test; to *Fraser*'s lewd, obscene, vulgar, or plainly offensive rule; and to *Morse*'s prohibition on violent and pro-drug speech.

Shirts worn during warm-ups that display messages, such as "Black Lives Matter," "I Can't Breathe," and "Arrest the Cops Who Killed Breonna Taylor" are protected under *Tinker* because the messages do not materially and substantially interfere (1) "with the requirements of appropriate discipline in the operation of the school" or (2) with the rights of others.[211]

Like the black armbands in *Tinker*, these messages simply represent a political viewpoint, even if not the most popular in a given community.[212] The shirts are worn to express disapproval of racial injustices and inequities in America, just as the armbands in *Tinker* expressed disapproval of the Vietnam War.[213] Athletes will continue to go about their game play, as they always do

206. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).
207. *Id.*
208. *See* Morse v. Frederick, 551 U.S. 393, 398, 410 (2007).
209. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969) (internal quotations omitted).
210. *See id.* at 506.
211. *See id.* at 513.
212. *See id.* at 510–11.
213. *See id*.

after completing warm-ups, and their choice to wear a shirt expressing a viewpoint has not and will not substantially or materially disrupt the game.[214]

It should be noted that a message similar to "Arrest the Cops Who Killed Breonna Taylor" could be argued to have a different effect than shirts displaying "I Can't Breathe" or "Black Lives Matter." The university may argue that this message is a more *pointed* attack at a small group of individuals, pointing to *Tinker*'s second rule stating that a student's free speech cannot substantially interfere with the rights of others.[215] Thus, the Court may turn to the Tenth Circuit which applied the second *Tinker* rule in the context of student athletes at public universities.[216] The *Williams* court focused on the religious rights of those being "targeted" by the message of the armbands, concerned with a statement that was not neutral in the context of religion.[217]

Analytically, a message imploring America to seek justice on behalf of Breonna Taylor does not infringe on the rights of others in the same way that the Tenth Circuit was concerned with an exercise of free speech that could override the rights of others under the Free Exercise Clause. Instead, similar to protecting a shirt displaying President George W. Bush as the "International Terrorist,"[218] the Breonna Taylor shirt is an expressive, political viewpoint asking for accountability and change.[219]

On the other hand, discipline of student athletes would likely be upheld if the message attacked groups based on protected categories[220] or their relevant constitutional rights.[221] Notably, this second *Tinker* rule has long been held by courts as dicta and has rarely been applied.

When it comes to game time—just like any other warm-up gear—there is a reasonable competing interest to require participating players to remove any shirts interfering with visibility of their uniform during game play. A court

214. *See id.* at 514.

215. *See id.*; Williams v. Eaton, 468 F.2d 1079, 1084 (10th Cir. 1972) (stating that the school's decision "protected against invasion of the rights of others by avoiding a hostile expression to them by some members of the University team.").

216. *See generally Williams*, 468 F.2d 1079.

217. *Williams*, 468 F.2d at 1084 (reasoning that the "mandate of complete neutrality in religion and religious matters [served] as the basis for the [trial] court's ruling[]" and subsequently affirming the trial court's findings).

218. *See* Barber ex rel. Barber v. Dearborn Pub. Schs., 286 F. Supp. 2d 847, 849 (E.D. Mich. 2003).

219. Breonna Taylor's death has sparked rigorous political debates around the use of force and no-knock warrants for law enforcement and racial bias in the United States. Additionally, her death inspired conversations around qualified immunity for police officers and holding officers accountable for crimes against citizens. Will Wright, *After Breonna Taylor's Death, Black Engagement in Kentucky Politics Soared*, N.Y. TIMES (Mar. 13, 2021), https://www.nytimes.com/2021/03/13/us/breonna-taylor-death-anniversary.html; *see also* Ben Tobin & Sarah Ladd, *How Protests over Breonna Taylor's Death Have Changed the Political Landscape*, LOUISVILLE COURIER J. (Sept. 9, 2020, 10:13 AM), https://www.courier-journal.com/in-depth/news/local/breonna-taylor/2020/09/04/breonna-taylor-protests-100-days-later-here-political-angles/5686191002.

220. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1171, 1177–78 (9th Cir. 2006) (finding disciplining a student for wearing a jacket displaying "HOMOSEXUALITY IS SHAMEFUL" was proper given that there were clear implications for substantially interfering with the rights of others and targeting students' protected categories), *vacated as moot by* Harper ex rel. Harper v. Poway Unified Sch. Dist., 549 U.S. 1262 (2007).

221. *See Williams*, 468 F.2d at 1084.

would likely find that this is not an unreasonable restriction since the referee's responsibilities at games would be materially and substantially disrupted if athletes did not adhere to the rules and regulations of the sport that pertain to jersey color, identification of players, and other aspects of uniforms. [222] By contrast, requiring the removal of articles such as armbands or wristbands would be prohibited unless the regulations of the sport specifically articulate a justified reason, such as the safety of other players.[223] Armbands do not have the effect of substantially disrupting game play because—similar to the armband in *Tinker*—the audience would be a passive witness.[224] So long as the viewpoint expressed by the armband—whether anti-war, anti-racism, or anti-amateurism—does not actively target or harass another group,[225] infringe the rights of others, or violate a reasonable game play regulation, wearing armbands will be constitutionally protected under *Tinker*.[226]

While many social justice related messages would be protected, *Fraser* would draw a boundary based on the specific wording employed in those messages. Messages using any sort of vulgarity, lewd language, or profanity, could be prohibited and subsequent discipline may be deemed constitutional.[227] Just as the *Fraser* Court stated, the First Amendment gives students the "right to wear *Tinker*'s armband, but not Cohen's jacket,"[228] which was famously adorned with "Fuck the Draft."[229] Even though both messages were anti-war viewpoints, word choice matters in the context of education. Thus, a message in support of Black lives or in support of social justice and accountability would be protected under *Tinker*, but a parallel message of "Fuck White Supremacy" or "Fuck the Police" may be barred under *Fraser.*[230] Similarly, under *Morse,* messages that call for violence or threats of violence and messages that promote

222. It would likely be reasonable to say that, in order to carry out the duties and regulations of game play, nothing blocking or obstructing the numbers or school names on the jerseys is allowed to be worn. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

223. A court would likely reason that player safety is a reasonable policy to allow restrictions of certain non-uniform gear, such as jewelry. *See Tinker*, 393 U.S. at 513.

224. *See id.* at 514.

225. *See Williams*, 468 F.2d at 1084.

226. *See Tinker*, 393 U.S. at 514. There is also growing support from the National Collegiate Athletic Association. Prior to the July 29, 2020 rule change, it would seem that the National Collegiate Athletic Association, at least in football, was silent on a policy regarding messaging surrounding causes or organizations. NAT'L COLLEGIATE ATHLETIC ASS'N, FREQUENTLY ASKED QUESTIONS ON UNIFORMS AND CONTEST DELAYS FOOTBALL – 2018–19, at 2, https://www.ncaa.org/sites/default/files/2018MFB_FAQ_Uniforms_Contest_Delays_20180921.pdf [https://web.archive.org/web/20190713131425/https://www.ncaa.org/sites/default/files/2018MFB_FAQ_Uniforms_Contest_Delays_20180921.pdf] (last visited May 12, 2021). After the July 29, 2020 regulation change, student athletes all seem to have the National Collegiate Athletic Conference's "blessing" to seek authorization from their university to display certain messages. NAT'L COLLEGIATE ATHLETIC ASS'N, PLAYING RULES CHANGES RELATED TO COMMEMORATIVE/MEMORIAL UNIFORM PATCHES SUPPORTING RACIAL AND SOCIAL JUSTICE (2020), https://ncaaorg.s3.amazonaws.com/championships/resources/rules/2020PR_UniformPatches.pdf.

227. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

228. *Id.* at 682 (internal quotations omitted).

229. Cohen v. California, 403 U.S. 15, 16 (1971).

230. *See Fraser*, 478 U.S. at 682.

drug use could be constitutionally prohibited and disciplined for violations thereof.[231]

CONCLUSION

Student athletes have the constitutional First Amendment right to protest during game day activities. Under *Barnette*, student athletes' choice to peacefully kneel is protected from requirements to stand during patriotic ceremonies under principles of compelled speech. Likewise, the affirmative message that kneeling expresses will be construed and protected under *Tinker*.

Game day uniform wear is subject to the reasonable rules and regulations of game play. The referee must be able to properly administer the game, differentiate players and teams from one another, and maintain the integrity of competition. Pregame warm-up gear, such as shirts displaying "Black Lives Matter," "I Can't Breathe," and "Arrest the Cops Who Killed Breonna Taylor," are a different matter, and each are protected speech under *Tinker* because there is no concern of substantial and material disruption. This is further evidenced by the fact that student athlete protest has never caused a substantial disruption to game play.

Universities will argue that their regulations are subject to the more lenient standards of *Hazelwood* because the student athlete is not only a representative of the school but additionally bears its colors and the university's name on their chest. Even so, collegiate athletics cannot be subject to *Hazelwood*. The university will struggle to prove that the public perceives student athlete expression as bearing the imprimatur of the school. Despite that requirement, *Hazelwood* additionally requires the activity be under faculty supervision. Game day activities are simply not supervised by faculty but instead the athletic staff of the university.

When examined within the bounds of First Amendment jurisprudence, the student athlete at a public university does not shed their constitutional rights at the schoolhouse gate—much less the hardwood floor. Instead, student athletes will favorably invoke *Barnette* and *Tinker*, successfully drawing the constitutional foul.

231. Calvert, *supra* note 55, at 1170.